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CAPITAL CASE

IN THE UNITED STATES SUPREME COURT

October Term, 2003

DAVID LARRY NELSON,
Petitioner,

vs.

DONAL CAMPBELL
and
GRANTT CULLIVER,
Respondents.

PETITIONER'S SUPPLEMENTAL BRIEF REPLYING TO RESPONDENT'S SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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CITATIONS TO THE RECORD

Citations to the record will be as follows:

Transcript of In-chambers Telephone Conference conducted by the United States District Court for the Middle District of Alabama on October 7, 2003 (T:appropriate page number);

Petitioner's Petition for Writ of Certiorari (PP: appropriate page number);

Petitioners Reply Brief to Respondent's Brief in Opposition (PRB:appropriate page number); and

Respondent's Supplemental Brief in Opposition (RSB:appropriate page number).

ARGUMENT AND AUTHORITY

I. INTRODUCTION

Presently pending before this Court is the Petitioner's Petition for Writ of Certiorari, which was filed on October 9, 2003. The Respondents filed a Brief in Opposition to said Petition for Writ of Certiorari on October 9, 2003. On October 20, 2003, the Petitioner filed his Reply Brief to the Respondents' Brief in Opposition. On November 10, 2003, the Petitioner was served with the Respondents' "Supplemental Brief in Opposition to Petition for Writ of Certiorari" (hereinafter referred to as the Respondents' "Supplemental Brief"). The purpose of this pleading is to respond briefly to several points raised in the Respondents' Supplemental Brief.[1]

II. THE RESPONDENTS' ASSERTION THAT UTILIZATION OF A CUT-DOWN PROCEDURE IS "MERELY A POSSIBILITY" IS DISINGENUOUS

The Respondents assert on page 7 of their Supplemental Brief that "the use of the [cut-down] procedure at issue is merely a possibility and will only be utilized as a last

[1] The Respondents' latest brief purports to be a supplemental brief filed pursuant Rule 15.8. of the Rules of this Court. The Respondents' latest brief, however fails to comply with Rule 15.8. in that said brief fails to refer to "new cases, new legislation, or other intervening matter not available at the time of the party's last filing." Since the Respondents' latest brief fails to comply with Rule 15.8., it is respectfully submitted that this Court should strike the Respondents' "Supplemental Brief" from the record if the Court deems such action appropriate.

resort." (RSB:7,fn. 3). This truly is a disingenuous statement by the Respondents given Respondent Culliver's discussions with the Petitioner, during which he initially proposed inserting the requisite catheter into the Petitioner via a cut-down procedure that would be performed at least twenty-four hours in advance of the Petitioner's execution. (T:9,12,23)(PP:16). If a cut-down procedure is "merely a possibility" as the Respondents assert, why was it the sole step in the plan Respondent Culliver' initially described to the Petitioner? Further, if a cut-down procedure is "merely a possibility", why did Respondent Culliver retain the cut-down procedure as the sole step in his plan after amending his plan during a second discussion with the Petitioner to have the cut-down procedure performed one to two hours before the Petitioner's execution? (T:9,24)(PP:16).[2] Obviously, the

[2] As is set forth in the Petitioner's Petition for Writ of Certiorari, Respondent Warden Culliver and a nurse met with the Petitioner together on two separate occasions to describe the medical procedure that Warden Culliver intends to implement with the Petitioner to gain venous access. Warden Culliver and the nurse initially described the medical procedure as (1) involving an incision of approximately 0.5 inch being made in the Petitioner's arm through which a catheter would be inserted into a vein and (2) being performed at least twenty-four hours in advance of the execution. Later, Warden Culliver and the nurse informed the Petitioner that (1) the incision will be approximately two inches in length and will be made either in the Petitioner's leg or arm, (2) this medical procedure will not be performed until approximately one hour before the execution, and (3) only a local anesthetic will be used during the procedure.

Respondents do not believe that the use of a cut-down procedure is "merely a possibility".

III. THE RESPONDENTS' ANALOGY OF THE PETITIONER'S MEDICAL PROCEDURE CHALLENGE TO A CHEMICAL COMPOSITION CHALLENGE IS COMPLETELY MISPLACED

In equating the Petitioner's challenge to the medical procedure to be performed upon him by the Respondents prior to his execution as a challenge to the Petitioner's sentence of death itself, the Respondents on page 8 of their Supplemental Brief assert, "Nelson's claim is no different than if he were challenging the use of a particular chemical during the lethal injection process." The Respondents' analogy is completely misplaced. Obviously, a challenge to the chemicals used for lethal injection constitutes a challenge to a sentence of death by lethal injection.

In sharp contrast, in the Petitioner's case, the Respondents will have to perform complicated, delicate surgery on the Petitioner in order to be in a position to carry out the sentence of death by lethal injection. The Petitioner's challenge is to this medical procedure and not to the sentence of death.[3] The Petitioner's argument simply is that the

[3] Consistent with this assertion, in Paragraph 2 of Respondent Warden Culliver's Affidavit, counsel for the Petitioner approached Warden Culliver with a request for death by electrocution because of the Petitioner's concerns regarding his veins only to be informed by Warden Culliver that electrocution was not an option for the Petitioner.

Respondents can place themselves in the very position in which they want to be by having a credentialed physician perform the surgery on the Petitioner, utilizing methods that comport with contemporary standards of medical care. As the Petitioner has repeatedly stated, he is not challenging his sentence of death but rather the medical procedures the Respondents have proposed performing in order for them to be in a position to proceed with the Petitioner's sentence of death. Had the Respondents months ago simply retained a credentialed physician to perform the requisite medical procedure, this litigation would not have been necessary.

IV. THE RESPONDENTS' REFERENCES TO OTHER STATES' LETHAL INJECTION PROTOCOLS ARE HIGHLY OFFENSIVE GIVEN THE RESPONDENTS' REFUSAL TO RELEASE THEIR PROTOCOL

That the Respondents have the gall to refer to other states' lethal injection protocols is extremely offensive given their refusal to release any information regarding their own protocol to any court, to the Petitioner, or to the public. The Respondents on page 9 of their Supplemental Brief rely on a law review article authored by Deborah Denno in support of their argument that, since a cut-down procedure is included in several other states' lethal injection protocols, the Respondents' use of a cut-down procedure is not aberrant. In so doing, the Respondents, of course, fail to address the qualifications of the people responsible for performing the cut-down procedures in

these other states. The Respondents also notably fail to quote many relevant parts of Ms. Denno's article, which is an article criticizing the lethal injection protocols of all the states. Some of those quotes which are relevant to the Petitioner's case are as follows:

> Legislatures delegate death to prison personnel and executioners who are not qualified to devise a lethal injection protocol, much less carry one out.

63 Ohio State Law Journal 63, 66 (2002).

> ...prison officials are wrongly delegated a degree of discretion for which they have no training and knowledge.

63 Ohio State Law Journal 63, 69 (2002).

> ...medically trained people have enough difficulty finding a vein with certain individuals; for untrained executioners, the problems are compounded substantially.

63 Ohio State Law Journal 63, 110 (2002).

> Ironically, the mere fact that the protocols in eight states warn executioners of problems, suggests that prison officials are aware of the hazards involved if ill-trained individuals administer a lethal injection. An experienced anesthetist would not need such warnings...

63 Ohio State Law Journal 63, 121 (2002).

> Finally, lethal injection is considered the most humane method for the euthanasia of animals. However, the Humane Society firmly states that the chemicals must be injected by "well trained and caring personnel" - - a sharp contrast to the qualifications available for those executing death row inmates.

63 Ohio State Law Journal 63, 110 (2002).

The Respondents on page 9 of their Supplemental Brief also refer to a "report on methods of execution and protocols" published by the Florida Senate Committee regarding other states' protocols that include cut-down procedures. The Respondents, however, do not describe any details from the report concerning the other states' protocols regarding the cut-down procedure. For example, the Respondents fail to note that the report states that Oklahoma requires a licensed phlebotomist be present to insert the intravenous lines in the condemned inmate and that a physician be present as a witness to the execution. (See http:www.fcc.state.fl.us/fcc/reports/monitor/methmon.html).[4]

V. THERE CLEARLY IS A SPLIT AMONG THE CIRCUITS CONCERNING THE OPERATION OF 28 U.S.C. §2244(b) AND ACTIONS FILED PURSUANT TO 42 U.S.C. §1983

On pages 2 through 6 of their Supplemental Brief, the Respondents contend that there is no split among the circuits concerning the operation of 28 U.S.C. §2244(b) and actions filed pursuant to 42 U.S.C. §1983. This is not true. As is set forth in the Petitioner's Reply Brief, there is a split among the

[4] It should be noted that the Respondents on page 11 of their Supplemental Brief assert that "at least fourteen other States consider a cut-down to be a viable method for obtaining venous access" but fail to offer a cite for this assertion. On page 9 of their Supplemental Brief, they name eleven states that they claim include cut-down procedures in lethal injection protocols, citing the aforementioned Florida Senate Committee report.

circuits. (PRB:12-14). The Eighth, Ninth, and Tenth Circuits are in conflict with the decision rendered in the Petitioner's case by the Eleventh Circuit.

The bottom line is that in the Eleventh Circuit, any action filed pursuant to 42 U.S.C. §1983 will be recharacterized as a habeas corpus petition and dismissed for lack of jurisdiction if the petitioner has previously filed a federal habeas corpus petition. However, in the Eighth, Ninth, and Tenth Circuits, such a §1983 action may be reviewed on the merits.

VI. CONCLUSION

For the reasons set forth herein as well as those set forth in the Petitioner's Petition for Writ of Certiorari and his Reply Brief, it is respectfully requested that this Court grant the Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this date served a true and correct copy of the Petitioner's Supplemental Brief Replying to Respondents' Supplemental Brief in Opposition to Petition for Writ of Certiorari by placing a copy same in the United States Mail with proper postage affixed thereto and addressed as follows:

Mr. Michael B. Billingsley
Assistant Attorney General
11 South Union Street
Montgomery, Alabama 36130

Dated: This 12th day of November, 2003.

Michael Kennedy McIntyre